IN THE

Supreme Court of the United States

OCTOBER TERM 1977

No. 78-415

HAROLD R. MAGNUSON,
Petitioner,
vs.
BURLINGTON NORTHERN, INC.,
D.S. NELSON, J.H. WOOLFORD
and G.J. O'CONNELL,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS NINTH CIRCUIT

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Petitioner, Harold R. Magnuson, prays that a writ of certiorari issue to review the Opinion of the United States Court of Appeals for the Ninth Circuit filed in the above entitled case on June 12, 1978.

CITATION TO OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Ninth Circuit is printed in Appendix "A" attached hereto. The Opinion and Order of the United States District Court for the District of Montana, Billings Division, dated May 21, 1976, granting removal from state court to

federal court, is printed in Appendix "B" attached hereto. The Order of the United States District Court granting the defendants' motion to dismiss dated July 12, 1976, from which Magnuson appealed to the United States Court of Appeals for the Ninth Circuit is printed in Appendix "C" attached hereto.

JURISDICTION

The Opinion of the United States Court of Appeals for the Ninth Circuit which is sought to be reviewed was entered on June 12, 1978. The jurisdiction of this Court is invoked under 28 USC §1254(1).

QUESTIONS PRESENTED

1. Where railroad employee is fraudulently denied impartial hearing at on-property investigation from which sole record is created which thereafter may be reviewed under administrative procedures of Railroad Labor Act, must such employee pursue empty and useless administrative procedures before asking judicial intervention for fraud in state court?

2. Where a railroad employee complains in state court of outrageous, tortious conduct committed by railroad management during purported on-property disciplinary proceedings, and there is no administrative device or procedure under the Railroad Labor Act to expose or rectify such tortious conduct, would not federal labor policy then favor concurrent state court jurisdiction to insure fair dealings, thus complementing the results intended by the Railroad Labor Act?

3. Where facts are alleged in state court action giving rise to claim of intentional infliction of emotional distress against railroad employee by management at on-property proceeding and employee seeks trial by jury on this issue, is he not entitled thereto by the Seventh Amendment?

STATEMENT OF THE CASE

On May 8, 1975, Magnuson filed his complaint in the District Court of the Thirteenth Judicial District of the State of Montana, attached hereto as Appendix "D". On May 27, 1975, the defendants named in the Complaint filed a Petition for Removal in the United States District Court for the State of Montana, Billings Division, under 28 USC §1441(b) alleging that the federal court had original jurisdiction by virtue of 28 USC §1337 and the R.L.A., 45 §151 *et. seq.* On May 30, 1975, Magnuson filed Objections to the Petition for Removal, and on June 3, 1975, filed a formal request for jury trial.

Thereafter the United States District Court issued its Opinion and Order granting removal dated May 21, 1976, (Appendix B). Based on the reasons set forth in this Opinion and Order the District Court then granted the defendants' motion to dismiss on July 12, 1976, (Appendix C).

Magnuson then appealed to the United States Court of Appeals for the Ninth Circuit on July 22, 1976. Said Court filed its Opinion affirming the United States District Court on June 12, 1978, (Appendix A). It is this Opinion that Magnuson seeks to have reviewed by this Petition for Certiorari.

STATEMENT OF FACTS

The essential facts of this case are contained in Magnuson's Complaint (Appendix D). The complaint states that Magnuson was a train dispatcher and had been employed by the Burlington Northern, Inc., for nearly twenty years as an operator and train dispatcher before May 11, 1971. On that date a head-on collision occurred between two extra freight trains at a point where defendant, Burlington Northern, Inc., hereinafter called Burling-

ton Northern, maintained a one track railroad in nonblock territory. As a result of this head-on collision, four fellow employees of Magnuson were killed and six others were injured.

At the time of this collision defendant, D.S. Nelson, was the Superintendent of the Burlington Northern's Montana Division, which includes the territory where the accident occurred and where the plaintiff was employed as a dispatcher. Defendant, J.H. Woolford, was the Assistant Superintendent of the Montana Division. The remaining defendant, Jeoffrey J. O'Connell, was the Division Claims Manager.

The complaint alleges that the defendants purported to conduct an investigation ostensibly for the purpose of determining the cause of this tragic accident. At this purported formal investigation the defendants called as witnesses only those persons who they desired to question in order to suppress or prevent the true facts from being made public. The defendants conspired to and did cover-up and conceal the true causes of the accident and wrongfully placed all of the blame for the accident on Magnuson.

The complaint contains numerous allegations of serious and longstanding managemental and supervisory errors and omissions amounting to wanton, willful and deliberate misconduct on the part of the defendants, evidence of which was carefully and intentionally withheld and concealed during the on-property investigation. The complaint in considerable detail sets out the numerous reasons for and causes of the collision, none of which were attributable to Magnuson, including the failure of supervisory or managemental personnel to institute appropriate safety rules, allowing and condoning violations of company safety rules, permitting, authorizing and even participating in acts of gross negligence, the result of which inevitably led to the entirely unnecessary tragedy.

All of this was known to the defendants, but they nevertheless conspired to keep these facts secret from the public and from Magnuson, and to publicly blame Magnuson as the sole party responsible for the deaths of and injuries to his fellow employees. This was designed to and did inflict severe emotional distress on Magnuson and in order for the Burlington Northern defendant officials to be consistent and to cover-up the longstanding negligent conduct of high railroad employees, it became necessary to find a scapegoat to be blamed and, of course, for a tragedy of this magnitude someone had to be fired. Instead of conducting an impartial investigation to reveal the true reasons for the head-on collision, the defendants chose to place the sole blame on Magnuson and, therefore, discharged him and whitewashed the officials of the Burlington Northern who were truly responsible for this accident, thus making Magnuson appear in the eyes of his former fellow workers and their families and friends as the sole villain responsible for this terrible tragedy.

The complaint further alleges that as the result of this conspiracy between the defendants, through the abusive and fraudulent use of the Burlington Northern's on-property internal disciplining processes, the defendants maliciously, fraudulently, oppressively, deliberately and knowingly destroyed Magnuson both emotionally and economically.

REASONS FOR GRANTING THE WRIT

1. The decision of the United States Court of Appeals for the Ninth Circuit sanctions and approves proceedings during the initial investigative hearing stages of the R.L.A. which so far depart from the accepted and usual course of judicial or administrative proceedings, as to call for an exercise of this court's inherent power of supervision. The effect of the Court of Appeals decision is to

grant managemental personnel, who control the initial investigative hearing, known as the "on-property investigation," license to commit fraud extrinsic to the proceeding which denies due process to parties under investigation and to prohibit any subsequent inquiry into such conduct before any tribunal with authority to examine into and apply a proper remedy for such conduct.

2. The decision of the United States Court of Appeals for the Ninth Circuit (Appendix A) has decided a federal question so as to be in conflict with a recent decision of this court. See *Farmer v. United Brotherhood of Carpenters and Joiners, Local 25,* 430 U.S. 290, 51 L.Ed.2d 338, 97 S.Ct. 1056 (1977).

3. The decision of the United States Court of Appeals for the Ninth Circuit deprives the petitioner of his constitutional right to trial by jury and, therefore, effectively decides an important question of federal law which has not been settled by this court, to-wit: whether holding that the subject matter of this action is within the exclusive jurisdiction of the Railway Labor Act, 45 USC §151 *et. seq.*, has the effect of denying the petitioner his constitutional right to trial by jury secured by the Seventh Amendment to the United States Constitution.

ARGUMENT

The Railway Labor Act Does Not Preempt The Exercise Of Jurisdiction By A State Court Of This Action For Intentional Infliction Of Emotional Distress

Magnuson's complaint states a claim at common law for intentional infliction of emotional distress. Under the rule of *Farmer v. United Brotherhood of Carpenters & Joiners, Local 25, supra,* 430 U.S. 290, where a defendant has intentionally engaged in outrageous conduct arising

in connection with employment covered by the National Labor Relations Act (N.L.R.A.;, 29 USC §151, *et. seq.*) a plaintiff who therefore suffers grievous emotional distress is not limited to the exclusive jurisdiction of the dispute resolving mechanisms of the N.L.R.A. This rule of law is equally applicable to employment relationships within the purview of the R.L.A., 45 USC §151, *et. seq.*

The preemption doctrine should not be applied to deny Magnuson his state court remedy because his complaint touches "interests so deeply rooted in local feeling and responsibility" that this court should not infer that Congress has deprived the states of the power to act under circumstances such as these. See *San Diego Building Trades Council v. Garmen,* 359 U.S. 236, at 243-344, 3 L.Ed.2d 775, 79 S.Ct. 773 (1959). See also *Linn v. Plant Guard Workers,* 383 U.S. 53, 15 L.Ed.2d 582, 86 S.Ct. 657 (1966) (malicious liable); *Automobile Workers v. Russell,* 356 U.S. 634, 2 L.Ed.2d 1030, 78 S.Ct. 932 (1958) (mass picketing and threats of violence); *International Association of Machinists v. Gonzales,* 356 U.S. 617, 2 L.Ed.2d 1018, 78 S.Ct. 923 (1958) (wrongful expulsion of union membership).

Permitting the exercise of state jurisdiction on the facts of this case does not result in state regulation of federally protected conduct in view of the absence of any provision of the R.L.A. preventing or even exposing the conduct complained of here, which included intentional infliction of emotional distress, conspiracy to deprive Magnuson of a fair hearing and conspiracy to fraudulently misrepresent the facts of the subject accident and Magnuson's innocence relative thereto. The rule of *Farmer* clearly stands for the proposition that the State of Montana has a substantial interest in protecting its citizens from outrageous conduct such as that alleged in Magnuson's complaint. This interest is no less worthy of recognition merely be-

cause it concerns protection from emotional distress caused by outrageous conduct rather than protection from physical injury or damage to Magnuson's reputation (also alleged in Magnuson's complaint).

Magnuson's complaint alleges that the defendants conspired to deceive the public into believing that he was responsible for the death of four of his fellow employees and injury to six other fellow employees. The complaint further alleges that all of this was done with full knowledge of the fact that Magnuson was innocent, that the managemental personnel in supervisory positions were clearly responsible, and that the purpose was to cover-up management's responsibility for the tragic accident, while at the same time providing a scapegoat therefor. Such intentional conduct is not protected under the R.L.A. The State of Montana has an overriding state interest in protecting its residents from this kind of intentional misconduct. In short "no reasonable man in a civilized society should be expected to endure" the conduct complained of here. *Farmer, supra,* 430 U.S. at 294,302.

There is no realistic risk that state damage actions such as this will fetter the exercise of rights protected under the R.L.A. Remanding this action to state trial court will "in no way undermine the vitality of the preemption rule." *Vaca v. Sipes,* 386 U.S. 171 at 180, 17 L.Ed.2d 842, 87 S.Ct. 903 (1967). There is no risk that permitting the state cause of action to proceed will result in state regulation of conduct that Congress intended to protect or in interference with the federal scheme of things.

Magnuson's complaint does not allege wrongful discharge within the meaning of *Andrews v. Louisville & N.R. Co.,* 406 U.S. 320, 32 L.Ed.2d 95, 92 S.Ct. 1562 (1972), wherein this court held that mere wrongful discharge of a railroad employee in violation of a collective bargaining agreement was a "minor dispute" within the

meaning of 45 USC §153 First (i) and therefore the discharged employee's exclusive remedy came under the R.L.A. The gravamen of Magnuson's complaint is intentional infliction of emotional distress. The only connection between the R.L.A. and the tort in question is that the initial investigative hearing stage of the R.L.A., which is totally within the control of the management of the railroad, was the vehicle or conduit for the intentional wrongful acts against Magnuson and the fraud committed by the defendants against him. There is no realistic potential for interference with the federal scheme of regulation under the facts of this case as there was in *Andrews.*

Magnuson's complaint alleges specifically and in considerable detail conduct on the part of the railroad management designed to circumvent the R.L.A. The abusive conduct of the defendants converted the R.L.A. into the instrument of harm to Magnuson, and now, under the decisions of the court below, the R.L.A. is utilized by the defendants to shield them from liability for their willful wrongdoing. The state tort alleged by Magnuson is a function of the particularly abusive manner in which he was treated by the defendants. Under such circumstances concurrent state jurisdiction should be both permissible and desirable as the state court action will greatly complement the intent and purpose of the proceedings under the Railroad Labor Act by providing a forum for the exposure of fraud, either extrinsic or intrinsic, with the result that those who have the responsibility (railroad management) for conducting a fair and impartial on-property hearing will hereafter realize that there is civil remedy for those employees deliberately deprived thereof. Surely both due process and public policy are compatible with concurrent state jurisdiction under these circumstances.

In *Gonzales, supra,* this court specifically recognized that an argumentative coincidence in the facts of a tort

action and a possible proceeding before the N.L.R.B. will not necessarily result in preemption:

> "If, as we held in the Laburnum case, certain state causes of action sounding in tort are not displaced simply because there may be an argumentative coincidence in the facts adducible in the tort action and a plausible proceeding before the National Labor Relations Board, a state remedy for breach of contract also ought not to be displaced by such evidentiary coincidence when the possibility of conflict with federal policy is similarly remote. The possibility of conflict from the court's award of damages in the present case is no greater than from its order that respondent be restored to membership. In either case the potential conflict is too contingent, too remotely related to the public interest expressed in the Taft-Hartley Act, to justify depriving state courts of jurisdiction to vindicate the personal rights of a ousted union member." *Gonzales, supra,* 356 U.S. at 621.

The connection between the tort alleged in Magnuson's complaint and the collective bargaining agreement is extremely tenuous and obviously insubstantial. The holding in *Farmer, supra,* indicates a return to the principles announced in *Linn, supra; Russell, supra;* and *Gonzales, supra,* all of which refuse to apply the preemption doctrine to cases which are arguably connected to the collective bargaining processes of the federal scheme of labor relations law. The decision of the Court of Appeals has been decided in direct conflict with the decision in *Farmer* and should, therefore, be reviewed by this court and reversed.

Right to Trial By Jury

The decision of the United States Court of Appeals for the Ninth Circuit deprives Magnuson of his constitutional right to trial by jury:

> "In Suits at common law, where the value in controversy shall exceed $20 the right of trial by jury shall be preserved ... " Seventh Amendment, Constitution of the United States.

The Ninth Circuit declined to rule on this constitutional issue "because it was neither raised nor decided below." (Appendix A). This is clearly incorrect because the jury trial argument was, in fact, raised at the onset of this action as indicated by the following quotation from the District Court's Opinion and Order:

> "This court also rejects the jury trial argument. The plaintiff's claim is properly part of an administrative scheme and therefore a jury trial is inappropriate and not required." (Appendix B)

This fundamental issue has never been decided by this court. In *Andrews, supra,* the majority of this court declined to rule on this constitutional issue because it was not set forth as a "question presented for review" in the petition for certiorari and therefore Rule 23 (1) (c) of the Supreme Court Rules precluded review. The dissenting opinion in *Andrews* did, however, address the issue and in strong language, almost prophetic of Magnuson, pointed out the mischief which could arise if the right to trial by jury under circumstances such as here are presented is denied a citizen, even an employee of the railroad.

Magnuson has continually demanded trial by jury during the proceedings at each level of review. He has repeatedly raised the constitutional question sought to be reviewed. His complaint does not find its genesis in the collective bargaining agreement between the Burlington Northern and his former union. The complaint is a common law suit by which he seeks redress of grievances in the traditional manner of suitors at common law.

This is not a constitutional attack on the R.L.A. *per se,*

but rather a constitutional attack on the manner in which the courts below have applied the R.L.A. to the facts of this case. The application of the R.L.A. to the facts of this case by the federal district court and the court of appeals necessitates a constitutional confrontation which can be avoided by construing the complaint as a claim for intentional infliction of emotional distress. Magnuson has not invoked the limitations of the R.L.A., nor has he sought reinstatement of his employment. He is no longer a member of the union that formerly represented him during minor disputes with railroad management. He has no place to turn to other than a court of law and a jury of his peers. His right of access to a jury is clearly secured by the Seventh Amendment. This issue is ripe for determination and should be heard by this court.

The Courts Below Sanctioned Extrinsic Fraud On The Part Of The Defendants Resulting In Denial Of Due Process And A Total Departure From The Accepted And Usual Course Of Judicial Or Administrative Proceedings

The decision of the United States Court of Appeals for the Ninth Circuit has the effect of granting respectability to fraudulent proceedings during the critical initial on-property investigation conducted by the railroad which was specifically designed to prevent Magnuson from having a fair hearing, and prohibiting any subsequent inquiry into this fraudulent conduct by any tribunal with jurisdiction of the controversy.

In order to appreciate the point being made here, one must fully understand the procedures of the R.L.A. Attached hereto as Appendix "E" is the Affidavit of Mr. C.R. Pfenning, President of the American Train Dispatchers Association, who has been a train dispatcher and union representative for twenty-five years who states

under oath:

> "That a dispatcher desiring to avail himself of any remedies under the Railway Labor Act and before the Railway Adjustment Board is confined entirely and solely to the record made by the railroad at the time of the investigation, which record is reduced to writing and thereafter a railroad em loyee may not add to, subtract from or provide facts different than the testimony and record made by the railroad at the time of the investigation."

This evidence of the finality of the initial on-property investigation as the sole fact finding proceeding under the R.L.A. was presented to the courts below and was totally uncontradicted. It points out that the sole fact finding hearing or investigation under the procedures available through the R.L.A. is the initial on-property investigation, which the complaint alleges was fraudulently conducted to paint Magnuson as a scapegoat. There are no procedures available within the R.L.A. to attack the facts adduced during this initial investigation. The complaint shows that Magnuson attempted the only administratively conceivable avenue to correct this deficiency by requesting a rehearing or new investigation, but the defendants refused to provide him with one in furtherance of their scheme to save themselves at the expense of his destruction. Thus, there was nothing that could have been accomplished under the R.L.A. in seeking review by a Railroad Adjustment Board, because any such board would have been limited to the fraudulently obtained and untrue facts contained in the written transcript of the initial on-property investigation.

The complaint alleges a conspiracy to whitewash the defendants at the expense of Magnuson. On May 13, 1971, Magnuson received notice of the hearing to be held on May 17, 1971. There was a weekend between the date he

received notice and the date of the hearing and he had no opportunity to obtain proper representation during this investigation. Fifth Amendment due process requirements are applicable to the proceedings within the R.L.A. *Southern Pacific Co. v. Wilson,* 378 F.2d 533 (CA 5, 1967); *System Federation, No. 30, Railway Employees Department v. Braidwood,* 284 F. Supp. 611 (DC Ill. 1968); *Switchmen's Union of North America v. Clinchfield R. Co.,* 310 F. Supp. 606 (DC Tenn. 1969), aff'd in *United Transportation Union v. Clinchfield R. Co.,* 427 F.2d 161 (CA 6, 1970), cert. den. 400 U.S. 824, 27 L.Ed.2d 53, 91 S.Ct. 48 (1970); *McDonald v. Penn Central Transportation Co.* 337 F. Supp. 803 (DC Mass., 1972); *Chicago, R.I. & P.R. Co. v. Wells,* 498 F.2d 913 (CA 7, 1974); *Barrett v. Manufacturers Railway Co.,* 326 F. Supp. 639 (DC Mo., 1971), aff'd 453 F.2d 1305 (CA 8, 1972).

The notice to which a person may be entitled under the due process clause is that which may be described as reasonable or adequate as to the time and place of the hearing. Recognizing that administrative agencies, especially those engaged in the business of government, are not obliged to proceed with the technical accuracy necessary to charge a defendant with liability in a court of law, *Earnshaw v. United States,* 146 U.S. 60, 36 L.Ed. 887, (1892), a party is nevertheless entitled to notice sufficient in time as well as content to enable him to prepare his defense or to meet the issues involved. *United States ex rel Turner v. Fischer,* 222 U.S. 204, 56 L.Ed. 165, (1911). The length of notice for an administrative hearing must depend in great measure upon the circumstances of each case. When you consider the circumstances of this case, wherein Magnuson's emotional well-being, life work, and reputation among his friends and acquaintances were placed in jeopardy, nothing less than notice of sufficient time to allow him to marshall his thoughts, obtain competent

representation, interview witnesses and prepare for their appearance would be constitutionally adequate.

Magnuson was not apprised of any charges pending against him prior to the time set forth in the hearing or during the hearing for that matter. The telegram which was sent to Magnuson four days prior to the hearing stated:

"GREAT FALLS MAY 13-1971

HAROLD MAGNUSON - - DSPR HAVRE HARLEM

ATTEND INVESTIGATION IN SUPT OFFICE AT HAVRE MONT AT 1 PM MONDAY MAY 17TH 1971 FOR PURPOSE OF ASCERTAINING *THE FACTS* AND DETERMINE YOUR RESPONSIBILITY IN CONNECTION WITH THE COLLISION BETWEEN EXTRA 2013 WEST AND EXTRA 2025 EAST, WHICH OCCURRED ABOUT 64 CAR LENGTHS WEST OF WEST SWITCH AT SHEFFELS MONT., AT ABOUT 11:45 PM ON MAY 11TH 1971 ARRANGE FOR REPRESENTATIVE AND OR WITNESS IF DESIRED, IN ACCORDANCE WITH GOVERNING PROVISION OF PREVAILING SCHEDULE RULES. PLEASE ACKNOWLEDGE RECEIPT BY AFFIXING YOUR SIGNATURE IN SPACE PROVIDED ON COPY OF THIS LETTER FILE Q-169.

D S NELSON, SUPT 212PM

ACKNOWLEDGING RECEIPT OF RECEIVING FILE Q-169 MAY 13TH 1971.

/s/ H. R. Magnuson" (Emphasis Supplied)

The sufficiency of an application, claim, petition, notice, or charge before an administrative agency or tribunal need not be a formal pleading such as required in a judi-

cial complaint or pleading in a court proceeding. Technical rules of pleading are not necessary or perhaps even applicable. But a statement of facts made with substantial certainty and sufficient detail so as to advise the person of the matters charged is definitely required. *Community of Woodston v. State Corp. Commission*, 186 Ka. 747, 353 P.2d 206 (1960).

The question of what constitutes sufficient specifics of the issues raised or charges made depends upon the violation alleged and the type of investigation being conducted. *Vitarelli v. Seaton*, 359 U.S. 535, 3 L.Ed.2d 1012, 79 S.Ct. 968 (1959) (statement of charges furnished, government employee suspended on security grounds); *Yoshizawa v. Hewitt*, 52 F.2d 411 (CA 9, 1931) (charge in proceeding for revocation of physician's license); *State ex rel Kirby v. Henderson*, 145 Iowa 657, 124 N.W. 767 (1910) (petition for removal of mayor on grounds of intoxication).

Particularly in a situation where the defense of private rights are involved a statement with reasonable and substantial certainty is required. *Jaffe v. State Department of Health*, 135 Conn. 339, 64 A.2d 330, 6 A.L.R.2d 664 (1949); *State ex rel Sbordy v. Rowlett*, 138 Fla. 330, 190 So. 59, 123 A.L.R. 769 (1939); *Dullam v. Willson*, 53 Mich. 392, 19 N.W. 112 (1884).

General charges without any specifications of facts are insufficient. *State ex rel Hart v. Duluth*, 53 Minn. 238, 55 N.W. 118 (1893). The subject telegram to Magnuson did not provide any statement of charges nor does it allege any facts upon which any charges could have been based. The complaint in this case alleges that contrary to anything contained in the telegram, the investigation was held for the sole purpose of covering up and concealing facts, not for the purpose of disclosing the truth.

Due process also requires a full, fair and impartial hearing, which was denied Magnuson. Under the administrative proceedings of the R.L.A. the evidentiary hearing or investigation is the very heart of the administrative process because all parties concerned and appeals therefrom before the Railroad Adjustment Board merely involve arguments based only upon the evidence adduced at these hearings.

The most rudimentary and elementary requirements of fair play were denied Magnuson here. These requirements demand at the very least "a fair and open hearing" which "embraces not only a right to present evidence, but also a reasonable opportunity to note the claims of the opposing party and to meet them." *Morgan v. United States*, 304 U.S. 1 at 14-15, 18, 82 L.Ed. 1129, 58 S.Ct. 773 (1937).

A key element of due process requires that the tribunal be a fair and impartial one. *Re Murchison*, 349 U.S. 133, 99 L.Ed. 942, 75 S.Ct. 623 (1954). The *Murchison* decision involved a tribunal which had an interest in the outcome of the proceeding and held that due process was therefore denied. The defendants here likewise had a keen interest in the outcome of the proceedings as evidenced by their conduct with regard to Magnuson. This alone leads to the unavoidable conclusion that Magnuson was denied a fair hearing.

Collusion between the defendants resulted in extrinsic fraud which has thus far effectively prevented Magnuson from ever having his day in court. Where an unsuccessful party like Magnuson has been prevented from exhibiting fully his case because of fraud or deception practiced on him by his opponent, there has never been a real contest in the hearing of the case and this amounts to extrinsic fraud as defined in *United States v. Throckmorton*, 98 U.S. 61, 25 L.Ed. 93 (1878), which held that a decision of a court or tribunal which has been procured through extrinsic fraud is not binding on the aggrieved party and he

may seek relief in a separate proceeding.

Extrinsic fraud by its very nature is not remediable by appeal or review. Consequently, a separate proceeding is absolutely essential to bring out the true facts. The complaint alleges conduct that was unknown to and concealed from Magnuson at the time of the purported hearing and which were only incidentally uncovered as the result of formal discovery proceedings in a separate FELA action arising out of the subject accident. The manner in which the defendants obtained the result that they desired by private illicit agreement and collusion separate and apart from the proceedings of the R.L.A. is totally inconsistent with the rull and fair hearing requirements of the due process clause.

CONCLUSION

Petitioner most earnestly urges that the on-property investigations are the cornerstones and foundations for all subsequent proceedings under the Railroad Labor Act. If there is to be fairness to railroad employees, it must come at this stage in the proceedings. If fraud is practiced upon an employee, or if duress or infliction of intentional emotional distress is practiced upon an employee at the on-property investigations, there is no redress under the R.L.A.

Petitioner conceives that it is of utmost importance that railroad management not be permitted to commit wrongful acts of any kind against employees at this stage in the proceedings and that the only remedy under the law, as it now exists, is in the nature of an action such as was brought here by petitioner who respectfully requests

this court to speak on this subject and to send this action back to state court for trial by jury as originally sought by this petitioner.

The petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX "A"
OPINION
NINTH CIRCUIT COURT
DATED—JUNE 12, 1978

No. 76-2949

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HAROLD R. MAGNUSON,

Appellant,

v.

BURLINGTON NORTHERN, INC.,
D.S. NELSON, J.H. WOOLFORD,
and G.J. O'CONNELL,

Appellees.

OPINION

Appeal from the United States District Court
for the District of Montana

Before:
BROWNING and HUFSTEDLER, Circuit Judges, and
BONSAL,* District Judge

HUFSTEDLER, Circuit Judge:

Magnuson appeals from a judgment dismissing his complaint based on common law intentional infliction of emotional distress on the ground that the gravamen of the action was a "minor" dispute growing out of his employment relationship with the defendant railroad and thus subject to the exclusive jurisdiction of the dispute resolving mechanisms under the Railway Labor Act ("R.L.A."), 46 U.S.C. §§151, *et seq.* 1/He contends that the district court erred in removing the action from the state court to the federal court and in dismissing it because (1) the gist of his action is in tort, rather than being based upon his wrongful discharge from his employment as a railroad worker and is thus within the exception created by *Farmer v. United Brotherhood of Carpenters & Joiners,*

Local 25 (1977) 430 U.S. 290, and (2) alternatively, his complaint should be construed as an action to set aside the grievance procedure decision on the ground of extrinsic fraud. We agree with the district court that Magnuson's claim was within the ambit of the R.L.A. and that his failure to pursue the statutory grievance procedure was fatal to his claim.

On May 11, 1971, Magnuson was on duty as a train dispatcher for Burlington Northern, Inc. when a head-on collision occurred between two freight trains, resulting in the deaths of four railroad employees and injuries to others. Burlington's Montana division, acting through superintendent Nelson, conducted an investigation into the causes of the accident, and after a hearing, decided that Magnuson was responsible for the accident. Magnuson was thereupon discharged. He brought this action in Montana state court against the railroad, Nelson, and other supervisory officials of the railroad, alleging that he was the victim of a conspiracy among the defendants to cover up their own negligence which caused the accident. He disclaimed any responsibility for the accident. Magnuson's theory was that the alleged conspiracy which led to his dismissal was an intentional infliction of emotional distress for which he sought damages.

Pursuant to defendants' motion, the cause was removed to the federal district court, after defendants successfully argued that Magnuson's complaint was governed by the provisions of the R.L.A.

Magnuson necessarily concedes that if his claim is properly characterized as a "minor dispute," state law is preempted and his exclusive remedy lies under the R.L.A., as interpreted by the Supreme Court in *Andrews v. Louisville & N.R. Co.* (1972) 406 U.S. 320. He contends that he has avoided *Andrews* by confining his complaint to a tort action for intentional infliction of emotional distress, thus

bringing himself within the exception to *Andrews* created by *Farmer v. United Brotherhood of Carpenters & Joiners, Local 25, supra,* 430 U.S. 290.

The first question is whether Magnuson's claim is a "minor" dispute within the meaning of 45 U.S.C. § 153 First (i), as in *Andrews,* or a common law tort exempted by *Farmer.* If the basic injury was his wrongful discharge, the complaint involves a minor dispute which must be arbitrated following the procedures of the R.L.A. All of the damages which he claims to have suffered flowed from his wrongful dismissal from his employment. The alleged evil motivation of the defendants would have caused him no legal injury if he had either not been discharged or if his discharge was not wrongful. The injuries for which he sought compensation included not only his emotional distress, but also his loss of income from his job from the time of his discharge until retirement age, together with loss of his retirement benefits. His emotional distress was an incident of the wrongful discharge, rather than a result of an alleged conspiracy. Every employee who believes he has a legitimate grievance will doubtless have some emotional anguish occasioned by his belief that he has been wronged. Artful pleading cannot conceal the reality that the gravamen of the complaint is wrongful discharge. If the pleading of emotional injury permitted aggrieved employees to avoid the impact of the R.L.A., the congressional purpose of providing a comprehensive federal scheme for the settlement of employer-employee disputes in the railroad industry, without resort to the courts, would be thwarted.

Magnuson's complaint will not fit within the narrow exception to federal preemption explained in *Farmer v. United Brotherhood of Carpenters & Joiners, Local 25, supra,* 430 U.S. 290. In *Farmer,* the petitioner's decedent, who had been a member and officer of the union, brought

the action for infliction of emotional distress based upon "outrageous" conduct by union officials, with whom he had quarreled, in subjecting him to a campaign of personal abuse and harassment. The alleged wrong by the union officials was not a grievance that was expressly covered by any provision of the N.L.R.A., and was only related tangentially to unfair labor practices which could have been made the subject of proceedings under the Act. The wrongful conduct was "a merely peripheral concern" of federal law *(San Diego Building Trades Council v. Garmon* (1959) 359 U.S. 236, 243) and both the wrongful conduct and the impact of that conduct upon the decedent affected interests which were "deeply rooted in local feelings and responsibility" (*id.* at 244). The Court emphasized that its non-preemption holding was not a signal that these causes of action for infliction of emotional distress were generally exampted from preemption. The federal law remained exclusive if the action touched on an area of primary concern. Unlike *Farmer,* this action is based on a matrix of facts which are inextricably intertwined with the grievance machinery of the collective bargaining agreement and of the R.L.A.

Apart from the wrongful discharge aspect of the case, the alleged actions of the defendants of which Magnuson complains involve abuse of the investigatory process and the alleged presentation of false or misleading evidence at the hearing that led to his discharge. Both the investigation requirement and the fair hearing right are products of a collective bargaining agreement. Under Article 24 of the labor contract between Burlington and the American Train Dispatchers' Association, a train dispatcher cannot be disciplined "without proper investigation." The Article also spells out the components of a proper investigation and a hearing, including prior notice to the employee, the right of the employee to representation and to the

presence of witnesses at the hearing, and the right of internal appeals, following decision, through the railroad hierarchy to the Adjustment Board. All of the alleged misfeasance of the railroad employees is thus "arguably" governed by the collective bargaining agreement or has a "not obviously insubstantial" relationship to the labor contract. Under these circumstances, the controversy is a minor dispute within the exclusive province of the grievance mechanisms established by the R.L.A. *(See, e.g., United Transp. Union v. Penn Central Transp. Co.* (3d Cir. 1974) 505 F.2d 542, 544-45 ("not obviously insubstantial"); *Local 1477, United Transp. Union v. Baker* (6th Cir. 1973) 482 F.2d 228, 230 (both tests used); *Railway Express Agency v. Brotherhood of Railway, Airline & Steamship Clerks* (5th Cir. 1971) 459 F.2d 226, 231 ("arguably"); *Airline Stewards Ass'n v. Caribbean Atlantic Airlines, Inc.* (1st Cir. 1969) 412 F.2d 289, 291 ("not obviously insubstantial"); *Southern R. Co. v. Brotherhood of Locomotive Firemen & Enginemen* (D.C. Cir. 1967) 384 F.2d 323, 327 (same).)

Magnuson makes two subsidiary arguments in support of his primary contention that his action falls outside the purview of the R.L.A. The first is that the exhaustion doctrine should not be applied to him because it would deny his right to a jury trial. The Act does not provide for trial by jury, but that fact supplies no basis for excluding his grievance from the scope of the Act. The argument is an oblique attack on the constitutionality of the Act. We decline to address any constitutional issue because it was neither raised nor decided below.

His second contention is that the defendants' abuse of the investigation and hearing procedures was a denial of due process and that he is entitled to present his constitutional claim in a judicial forum without being required to exhaust his administrative remedies. Like the jury trial

contention, this argument is little more than a restatement of his basic thesis that his complaint does not present a minor dispute. Because all of the claimed due process violations are also violations of the terms of the collective bargaining agreement, it is unnecessary to reach any constitutional question. These arguments not only can, but they must be addressed in the first instance to the forums provided by the Act. *(Cf. Andrews v. Louisville & N.R. Co., supra,* 406 U.S. at 324; *Hornsby v. Dobard* (5th Cir. 1961) 291 F.2d 483, 487).

Finally, Magnuson contends that we should construe his complaint as an action to set aside the determination by the railroad hearing panel on the ground of extrinsic fraud. He argues that the Act provides no procedure for attacking before the Adjustment Board a final discharge determination on the ground of extrinsic fraud, and, therefore, he had no administrative remedies to exhaust. We reject the argument. Even giving a very liberal construction to the complaint, we are unable to read it as a claim for relief on the ground of extrinsic fraud. The allegations of misconduct are not collateral to the proceedings that he challenges in any respect. Moreover, nothing in the structure of the R.L.A. supports a contention that Congress intended to permit any judicial intervention in the grievance procedures until a claimant had exhausted his remedies within the statutory structure. Although the Act does not expressly provide that the Adjustment Board can entertain an attack upon a decision by a hearing officer on the ground that the decision was obtained either by extrinsic or intrinsic fraud, that power is implicit in the reviewing procedure established by the Act. We have no occasion on this record to reach the question whether the Adjustment Board could or would entertain a collateral attack on a discharge determination with respect to a claimant who had earlier failed to pursue his remedies before the

Adjustment Board, nor do we have any reason to concern ourselves with the availability of collateral attack through the judicial process in respect of a claimant who has fully exhausted his administrative remedies.

AFFIRMED.

1/*See* 413 F. Supp 870 (D. Mont. 1976)

*Honorable Dudley B. Bonsal, Senior United States District Judge, Southern District of New York, sitting by designation.

APPENDIX "B"
OPINION AND ORDER
UNITED STATES DISTRICT COURT
DATED—MAY 21, 1976

CV-75-52-BLG
IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

HAROLD R. MAGNUSON,

Plaintiff,

—vs—

BURLINGTON NORTHERN, INC., a corporation, D.S. NELSON, J.H. WOOLFORD and GEOFFREY J. O'CONNELL,

Defendants.

OPINION AND ORDER

Presently pending is the defendants' effort to remove this action from state court; the plaintiff resists.

BACKGROUND FACTS

The plaintiff, a train dispatcher, was on duty at the time of a collision between two trains near Havre. An investigative hearing was held shortly after the accident and resulted in the discharge of the plaintiff. The plaintiff alleges that he in no way caused the accident but contends that the management personnel fired him in an effort to whitewash their own negligence. The plaintiff argues that his discharge amounted to tortious conduct on the part of the defendants.

The plaintiff does not seek reinstatement as a Burlington Northern employee but seeks monetary damages for past and future wages, retirement benefits, malicious and intentional infliction of emotional distress, and punitive damages.

The defendants contend that the plaintiff was a railroad employee; as such, his relationship with his former employer, Burlington Northern, came under the jurisdiction of the Railway Labor Act; and the agreement between

Burlington Northern and the American Train Dispatchers Association was entered into pursuant to the duty imposed by 45 U.S.C. § 152, First (Railway Labor Act). The defendant agrues that federal law is controlling, and, thus, the action should be removed to Federal Court.

The plaintiff, who has not exhausted his administrative remedies under the agreement between the Burlington Northern and the American Train Dispatchers Association, argues that there is no point in appealing to the Railway Adjustment Board, since the Board is composed of representatives from carriers, which would certainly not support him, and representatives of the Union, which refused to offer him support during the initial hearing. Furthermore, the plaintiff would have no judicial review of the Board's determination except in the case of fraud or lack of jurisdiction of the Board. 45 U.S.C. § 153 (p).

DISCUSSION

The key case to this issue is *Andrews v. Louisville & Nashville Railroad Co.*, 406 U.S. 320 (1971). In that case, the plaintiff, prior to an automobile accident, had been a railroad employee in good standing. He alleged that following the accident he had fully recovered and was physically able to resume his work for the company, but that the company had refused to allow him to return to work, and that the company's actions amounted to a wrongful discharge. He asked for past and future earnings and attorney's fees. In that opinion, the Supreme Court reviewed the history of cases of this kind. Originally, *Moore v. Illinois Central Railroad Company*, 312 U.S. 630 (1941), held that "the railroad employee who elected to treat his employer's breach of the employment contract as a discharge was not required to resort to the remedies afforded under the Railway Labor Act for adjustment and arbitration of grievances, but was free to commence in state

court an action based on state law for breach of contract." *Andrews, supra,* at 321. That decision was based on the conclusion that the Congress had intended the procedure for adjustment of disputes to be optional and not compulsory.

But, the Andrews decision specifically overruled *Moore.* In *Andrews,* the Court noted that provision for arbitration of a discharge grievance is not a matter of voluntary agreement under the Railway Labor Act; the Act compels parties to arbitrate minor disputes before the National Railroad Adjustment Board established under the Act. *Walker v. Southern Railroad Co.,* 385 U.S. 196, 198 (1966).

In *Andrews,* the plaintiff argued that "his election to sever his connection with the employer and treat the latter's alleged breach of the employment contract as a discharge renders his claim sufficiently different from the normal disputes over the interpretation of a collective bargaining agreement to warrant carving out an exception to the otherwise mandatory rule for the submission of disputes to the Board." But, the Court stated:

> "But the very concept of 'wrongful discharge' implies some sort of statutory or contractual standard that modifies the traditional common-law rule that a contract of employment is terminable by either party at will. Here it is conceded by all that the only source of petitioner's right not to be discharged, and therefore to treat an alleged discharge as a 'wongful' one that entitles him to damages, is the collective-bargaining agreement between the employer and the union. Respondent in this case vigorously disputes any intent on its part to discharge petitioner, and the pleadings indicate that the disagreement turns on the extent of respondent's obligation to restore petitioner to his regular duties following injury in an automobile accident. The existence and extent of such an obligation

in a case such as this will depend on the interpretation of the collective-bargaining agreement. Thus petitioner's claim, and respondent's disallowance of it, stem from differing interpretations of the collective-bargaining agreement. The fact that petitioner intends to hereafter seek employment elsewhere does not make his present claim against his employer any the less a dispute as to the interpretation of a collective-bargaining agreement. His claim is therefore subject to the Act's requirement that it be submitted to the Board for adjustment." *Andrews, supra,* at p. 324.

The plaintiff's entire position was most adequately and forcefully argued by Mr. Justice Douglas in his dissent in *Andrews,* and his arguments were not convincing to the Court. There has been a clear, manifested Congressional intent that disputes be settled in accordance with the contractually agreed-upon arbitration procedures set forth in the Railway Labor Act. The plaintiff's employment rights were created by and are subject to the Railway Labor Act and therefore are governed by federal labor law, which is paramount to the state law. To deny removal would jeopardize federal labor policies. See *Macy v. Trans World Airlines, Inc.,* 381 F. Supp. 142 (D. Md. 1972).

This Court also rejects the jury trial argument. The plaintiff's claim is properly part of an administrative scheme and therefore a jury trial is inappropriate and not required. Relying upon *United Steelworkers of America v. Enterprise Wheel & Car Corp.,* 363 U.S. 593 (1960), the Tenth Circuit in *Brotherhood of Railroad Trainmen, et al. v. Denver & R.G.W.R. Co.,* 370 F.2d 833, 836 (1966), stated:

"Finally, the railroad contends that Public Law 89-456, by making the findings of the Board conclusive

and by refusing review of an order requiring the payment of money damages, is violative of the Seventh Amendment right to trial by jury. We can place no constitutional significance in the statutory amendments as such. The right to a jury in the district court existed before the 1966 amendments and it exists now. The significance of the amendments lies in bounding the already limited scope of judicial review so that the merits of the controversy are in reality a closed question after determination by the Board. Such power in Congress is recognized by the Supreme Court as proper in the field of railway labor law in Gunther and reflects the theory that compulsory arbitration of labor disputes must be final, for the 'federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards.' United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 596, 80 S.Ct. 1358, 4 L.Ed.2d 1424."

Therefore, IT IS ORDERED that the defendants' petition for removal is granted.

Done and dated this 21st day of May, 1976.

/s/ James F. Battin
United States District Judge

APPENDIX "C"
ORDER
UNITED STATES DISTRICT COURT
DATED—JULY 12, 1976

CV-75-52-BLG
IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

HAROLD R. MAGNUSON,

Plaintiff,

—vs—

BURLINGTON NORTHERN, INC., a corporation, D.S. NELSON, J.H. WOOLFORD and GEOFFREY J. O'CONNELL,

Defendants.

ORDER

For reasons presented in the Court's order of May 21, 1976, the defendants' motion to dismiss is GRANTED.

IT IS FURTHER ORDERED that the hearing set for August 4, 1976 is vacated.

Done and dated this 12th day of July, 1976.

/s/ James F. Battin
United States District Judge

APPENDIX "D"
COMPLAINT
DATED—MAY 8, 1975

NO. 66816

IN THE DISTRICT COURT OF THE
THIRTEENTH JUDICIAL DISTRICT OF
THE STATE OF MONTANA, IN AND FOR
THE COUNTY OF YELLOWSTONE

HAROLD R. MAGNUSON,
Plaintiff,
vs.
BURLINGTON NORTHERN, INC., a corporation,
D.S. NELSON, J.H. WOOLFORD and
GEOFFREY J. O'CONNELL,
Defendants.

COMPLAINT

For his claim against the defendants, plaintiff states:

I

That the defendant Burlington Northern, Inc. is a corporation conducting among other things, a business known as the Burlington Northern Railroad with railroad lines running across the State of Montana and to many communities within the State of Montana.

II

That in May of 1971 and for nearly twenty years prior thereto plaintiff was employed by the defendant as an operator and as a train dispatcher in Harlem and Havre, Montana.

III

That on May 11, 1971 a head-on collision occurred between two extra freight trains at a point a few miles northeast of Great Falls, Montana where the defendant

Burlington Northern, Inc. maintained a one track railroad in non-block territory.

IV

That on May 11, 1971 the defendant D.S. Nelson was Superintendent of the Montana Division which included the territory where said accident occurred and the territory which was dispatched by plaintiff for Burlington Northern, Inc. at which time defendant Nelson maintained his principal office and residence in Great Falls, Montana.

V

That on May 11, 1971 the defendant J.H. Woolford was the assistant superintendent of the Montana Division having his main office and residence at Havre, Montana.

VI

That on May 11, 1971 defendant Geoffrey J. O'Connell now of Billings, Montana, was the Division Claims Manager for the Montana Division of the Burlington Northern, Inc. having his principal office and residence in Great Falls, Montana.

VII

That immediately after the said head-on collision which occurred on May 11, 1971, and in which four employees of the Burlington Northern, Inc. were killed and six others injured, the defendants and each of them purported to conduct an investigation for the ostensible purpose of determining the cause of said tragic accident.

VIII

That on May 17, 1971, the defendants purported to hold a formal investigation where the Burlington Northern, Inc. supposedly called all persons who could be responsible for the accident to be questioned to determine the cause or causes of the said head-on train collision. At this purported formal investigation, defendant Nelson on behalf of defendant Burlington Northern, Inc., questioned each of the witnesses and principals previously determined by all of the defendants herein to be the only persons they desired to question and the only persons who could in any way be responsible for the subject accident, however, the defendants worked and conspired together not to determine the cause or causes of the subject accident, but on the contrary, to find someone working for the Burlington Northern, Inc. in a non-supervisory or managerial capacity on whom the defendants could blame the said accident and thus relieve the executives, managemental personnel and supervisory personnel of the Burlington Northern, Inc. of any responsibility therefor except that responsibility which legally attaches because of negligence of an ordinary employee.

IX

That plaintiff herein was called as a principal and witness to the purported formal investigation of the Burlington Northern, Inc. and was not allowed anywhere near adequate time to prepare a defense for charges not presented to him and where he assumed that the defendants would call all of the railroad personnel who might be involved in the cause or causes of said accident even if this included personnel of Burlington Northern, Inc. who were in a supervisory or managerial capacity if said persons were in any way responsible for the cause of any causes of

said accident although the defendants instead did not have any of the railroad personnel who were really responsible for the accident there for questioning.

X

That following the so-called formal investigation and on May 21, 1971, defendant D.S. Nelson wrote a letter of discharge at Great Falls, Montana which was delivered to plaintiff at Harlem, Montana by defendant J.H. Woolford and thereafter the defendant consistently refused to grant to plaintiff a new investigation, call the appropriate witnesses, reconsider the decision to discharge him, but instead and on the contrary at that time and ever since have maintained that the cause of the deaths of the four Burlington Northern employees and the injuries to the other six involved in the head-on collision on May 11, 1971 was caused solely by the negligence of plaintiff herein.

XI

That on May 11, 1971, the trains involved in the said head-on collision were dispatched from Havre, Montana as were all of the trains of the Burlington Northern in its Montana Division which is comprised of three Districts being the west, east and south districts. That at that time there were three shifts known on the railroad as tricks for dispatchers at Havre with the first trick or daytime shift being comprised of three dispatchers or one for each of said districts but that for some years prior thereto the first shift dispatchers came to work at different hours under an arrangement where the dispatcher who had the south district which included the line from Havre to Great Falls came to work an hour before the dispatcher having the east district and as a result of these procedures set up by the Burlington Northern the first trick dispatcher having the south district transferred his district for the

last hour to the dispatcher who had the east district so that the first trick dispatcher for the east district then for less than an hour had the combined east and south districts of the Montana Division of the Burlington Northern and then made the transfer of the east and south districts to the second trick dispatcher, in this case plaintiff.

The first trick operator at the Havre relay office went off shift at 4:00 p.m. on May 11, 1971 and was relieved by the second trick operator to whom the first trick operator made a transfer according to the rules and procedures of the Burlington Northern at Havre, Montana.

That because of the fact that the line from a point just west of Havre, Montana to Great Falls was one track non-block territory the movements of the trains between Havre and Great Falls which were all freight trains or extra trains were controlled entirely by train orders and clearances prepared and authorized by the dispatchers and operators at Havre.

That on May 11, 1971 the first trick dispatcher having the south district issued train orders to extra train 2013 west to run from Havre to Great Falls and authorized a clearance to said train at 3:08 p.m. The train orders and clearance were actually prepared by the first trick operator under the direction and orders of the first trick dispatcher but the crew for this train was not even called on duty until 8:30 p.m. and in the meantime the first trick dispatcher who issued the train orders and authorized the clearance for said train went off duty and transferred the south end to the first trick dispatcher who had been dispatching the east district all day and who less than an hour later transferred both districts to plaintiff herein in the manner of long standing condoned by the Burlington Northern but in violation of its own rules and which dispatcher did not inform plaintiff herein that said train had been cleared but the crew not called on duty which was

not a violation of any rules of the Burlington Northern but was a highly unusual circumstance.

That at the Havre relay office for many many years the method of delivering the train orders and clearance to the conductor who was in charge of the trains leaving Havre was to place the orders and clearance on or near the register on the counter in the relay office where the conductor could pick up his orders and clearance without anyone knowing when he did so and then take the train and leave. The train orders were the orders by which the train moved and which governed the movements but the clearance which must be in writing as must the train orders is the authority for the conductor to take his train and leave and on May 11, 1971 the first trick operator on instructions from the first trick dispatcher, as aforesaid, cleared the train at 3:08 p.m. and delivered the orders to the conductor of said train by placing them on the register as aforesaid at that time and thereafter no employee of defendant Burlington Northern saw the conductor pick up the orders and clearance issued by the first trick dispatcher and operator and with which orders and clearance the conductor of extra 2013 west did in fact leave Havre at 9:10 p.m. after having been called on duty at 8:30 p.m.

That at the time the first trick dispatcher issued the train orders for extra 2013 west and authorized the operator to clear it at 3:08 p.m. he did not know that an extra freight train would be ready to leave Great Falls and go to Havre before extra 2013 west reached Great Falls but after plaintiff went on shift as the second trick dispatcher at 4:00 p.m. on said day, he was informed that the train from Great Falls to Havre would be ready to make its run and he therefore issued train orders and authorized the clearance for the extra train from Great Falls to Havre and issued a new clearance and train order authorizing extra 2013 west to leave Havre and arrange for a meet at

the Portage siding so that one freight train could pass the other safely not knowing that the first trick dispatcher had previously cleared the same train running from Havre to Great Falls without a meet order or that the conductor had picked up the first clearance and order. Plaintiff herein dictated his orders to the second trick operator who wrote them out, prepared a written clearance and placed them on the register for delivery to the conductor of extra 2013 west not knowing the train had previously been cleared or that the conductor had actually taken the first set of orders and clearance and as a result the conductor of extra 2013 west did not know that there would be a train leaving Great Falls for Havre and that there was supposed to be a meet at the Portage siding so that his train passed the Portage siding at night and in a cut collided head-on with the train running from Great Falls to Havre causing the deaths and injuries aforesaid.

That the Burlington Northern, Inc. is a railroad resulting from a consolidation of several railroads including the Great Northern Railroad and by which latter railroad nearly all of the personnel who worked out of Havre and Great Falls, Montana had been employed, most of them for many years which includes plaintiff herein.

As of January 1, 1971 the Burlington Northern, Inc. issued a new dispatchers manual which changed the dispatching procedures insofar as it pertained to keeping track of clearances and which clearances are the dangerous items to get into the hands of the conductor as he can then take his train and leave. The Burlington Northern scheduled a class for the dispatchers to attend if they were interested in attending the class to explain the new rule changes but did so by a bulletin which merely suggested that the dispatchers might attend the class but did not make the class on the rule changes mandatory as this would have compelled the Burlington Northern to

pay its dispatchers for the hour or so that the class took whereas by not making the class mandatory the railroad saved the money it would have to pay the dispatchers to learn the rule changes.

That the railroad conducts periodic rules examinations for its various personnel including dispatchers and operators but no rule examinations for dispatchers at Havre, Montana were conducted prior to the accident and after the rule changes which became effective on January 1, 1971 during all of which time plaintiff herein was entering his clearances in the appropriate places and books maintained by the Burlington Northern, Inc. in the manner that he had done for 19 years thereto under the old Great Northern system but in a manner which was very plain and obvious to any supervisory personnel who would take the time to glance at the train order books maintained and supposedly audited and checked by the Burlington Northern supervisory personnel who would instantly have known that plaintiff herein was operating according to the old Great Northern rules rather than the rule changes instituted but not promulgated by Burlington Northern, Inc.

That the Burlington Northern, Inc. has physical and health standards for its employees in responsible positions and in violation of its own standards in this regard engaged a first trick dispatcher who had the staggered shift and responsibilities of the east district of the Montana Division for seven hours and then was given the combined east and south districts for less than one hour which dispatcher had a serious heart condition and was taking various prescription medications including approximately six 5 millegram tranquilizing tablets of Valium a day and had done so for years and suffered for years from hypertension even though by a special notice of defendant D.S. Nelson on January 1, 1971, all responsible personnel of

Burlington Northern were forbidden to take drugs of this kind while on duty or for 12 hours prior thereto but which rule was waived by Burlington Northern and its supervisory personnel such as D.S. Nelson and J.H. Woolford as well as the main office personnel in St. Paul, Minnesota in this case even though the manufacturer of the drug Valium warns that it may cause such things as forgetfulness and fatigue.

XII

That the real reasons and proximate causes of the head-on collision between the two trains of the Burlington Northern on May 11, 1971 and which at all times herein were in fact known to each of the defendants herein who conspired to keep them secret and instead to blame plaintiff herein for said accident and wrongfully discharged him from his employment with Burlington Northern, Inc. are as follows:

1. The clearing of extra train 2013 west 5½ hours before the crew was even called on duty.

2. Delivering train orders and clearances to the conductors by having the operator place the same on or near the train register on the counter in the relay office.

3. Allowing the conductors of trains leaving Havre to take train orders and clearances without the operator knowing that the conductor had done so.

4. Failing to require the operator to keep the time of the train departures.

5. Failing to have any provision for the transfer between operators of the written clearances with which the conductor could take his train and leave if said clearance had in fact not been delivered to the conductor.

6. Having staggered shifts for the first trick dispatcher so that one of the first trick dispatchers had the south

district of the Montana Division for less than an hour before making a transfer to his relieving dispatcher.

7. Placing a dispatcher with a bad heart condition who was on many prescription medications including tranquilizers in a dispatching job as difficult as the one of the first trick dispatcher at Havre, Montana on May 11, 1971 held by the dispatcher who made the transfer to plaintiff herein.

8. Allowing the first trick dispatcher who had the combined east and south districts for less than an hour to make a transfer to his relieving dispatcher in violation of Rule 17 of the Dispatchers Manual which requires him to make his own written transfer but instead merely to pass on to his relieving dispatcher the transfer made to him by the dispatcher he relieved of the south district.

9. Failing to make it mandatory for the dispatchers at Havre, Montana to learn the new rules instituted by Burlington Northern, Inc. effective January 1, 1971 which changed the method of recording clearances for the trains dispatched from Havre.

10. The failure of the supervisory personnel of Burlington Northern, Inc. to check the records of transfers of clearances and other appropriate records to determine whether or not the new rules pertaining to recording clearances were in fact being followed by the dispatchers at Havre, Montana, or whether they were still dispatching under the old Great Northern procedures.

11. Having a rule which required a written transfer of undelivered train orders on a prescribed form between operators but providing no prescribed form and having a system where no one knew when an order was delivered, undelivered or half delivered at the Havre relay office so as to make it impossible for the operators to comply with the railroad's operating rules.

XIII

That as a result of the negligence of the supervisory personnel employed by Burlington Northern, Inc. in failing to institute appropriate safety rules, allowing violations of their own safety rules, permitting and authorizing and condoning each of the things set forth in Paragraph XII above, plaintiff committed a human and foreseeable error which would never have occurred if the supervisory personnel of Burlington Northern, Inc. had not negligently done or permitted any one of the things set forth in the preceding paragraph.

XIV

That the so-called formal investigations conducted by the railroad following accidents involving its men and equipment are held ostensibly to determine the reasons and causes for said accident but in truth and in fact are held for the purpose of placing blame on a working person and to whitewash the errors, omissions and negligence of the railroad's supervisory and managemental personnel and as set forth hereinabove the defendants and each of them prior to and at the time of the so-called formal investigation determined to cover up and conceal the real causes of the tragic accident occurring on May 11, 1971 and to wrongfully place the blame therefor and all of the blame therefor on plaintiff herein.

XV

As a result of being wrongfully discharged by the defendant Burlington Northern, Inc. plaintiff has lost income to date in the amount of $48,000.00 and will lose income to age 60 in the amount of $120,000.00 and retirement benefits which would thereafter have accrued to him as a result of his employment on the railroad in the amount of $125,000.00.

XVI

That the plaintiff was the only one discharged by the Burlington Northern, Inc. and blamed for the death of the four men and injuries to the six others in the head-on collision aforesaid and as a result of being so blamed by the railroad and discharged by it when all of the defendants herein knew that this was not the truth but nevertheless maliciously treated plaintiff in the manner aforesaid, the defendants inflicted terrible emotional distress on plaintiff, made him the villain of this terrible tragedy in the eyes of his former fellow workers and their families and friends as well as the other victims of this tragedy all to his damage in the sum of $250,000.00.

XVII

That the defendants together with other supervisory and managemental personnel of the defendant Burlington Northern Inc. conspired to lay the blame for this tragedy on plaintiff through its internal disciplining processes and fraudulently, maliciously, oppressively, deliberately and knowingly attempted to and partly succeeded in destroying plaintiff herein economically and emotionally all the time knowing that the true and real reasons for the tragic accident were as set forth in paragraph XII above.

WHEREFORE, Plaintiff prays judgment against the defendants as follows:

1. For the sum of $48,000.00 for income loss to date.
2. For the sum of $120,000.00 for income loss to age 60.
3. For the sum of $125,000.00 for retirement benefits he would have been entitled to after age 60.
4. For the sum of $250,000.00 for the malicious and intentional infliction of emotional distress upon him.

5. For the sum of $15,000,000.00 for punitive or exemplary damages.

DATED this 8th day of May, 1975.

HOYT & BOTTOMLY
/s/ JOHN C. HOYT
Attorneys for Plaintiff
320 First Avenue North
Great Falls, Montana 59401

APPENDIX "E"
AFFIDAVIT
C.R. PFENNING
DATED—October 25, 1975

CV-75-52-BLG
IN THE DISTRICT COURT
OF THE UNITED STATES
DISTRICT OF MONTANA
BILLINGS DIVISION

HAROLD R. MAGNUSON,

Plaintiff,

—vs—

BURLINGTON NORTHERN, INC., a corporation,
D.S. NELSON, J.H. WOOLFORD and
GEOFFREY J. O'CONNELL,

Defendants.

AFFIDAVIT

STATE OF ILLINOIS)
) ss.
County of Cook)

C.R. PFENNING, being first duly sworn on oath, deposes and says:

That he is the President of the American Train Dispatchers Association, with offices at the International Headquarters thereof located at 1401 South Harlem Avenue, Berwin, Illinois.

That your affiant has been a train dispatcher for the past twenty-five years and a railroad employee since 1937; that he was the Office Chairman for the American Train Dispatchers Association from 1957 to 1960 and General Chairman thereof from 1960 to 1964, Trustee of the American Train Dispatchers Association from 1964 to 1969, and has been President of said organization since that time.

That since 1957, your affiant has had extensive exposure to disciplining procedures, railroad investigations and Board hearings held pursuant to the mechanisms set forth in the Railway Labor Act.

That your affiant of his own knowledge and from his research and the research done by the American Train Dispatchers Association, makes the following statements:

1. That the contract between the American Train Dispatchers Association and the railroads, including Burlington Northern, Inc., provides that a dispatcher who is sought to be disciplined by the carrier shall be provided a fair and impartial hearing.

2. That a dispatcher desiring to avail himself of any remedies under the Railway Labor Act and before the Railway Adjustment Board is confined entirely and solely to the record made by the railroad at the time of the investigation, which record is reduced to writing and thereafter a railroad employee may not add to, subtract from or provide facts different than the testimony and record made by the railroad at the time of the investigation.

3. That the personnel of the American Train Dispatchers Association do not have available in order to represent a dispatcher who might have a grievance or is wrongfully charged or discharged by a railroad to discovery proceedings such as may be utilized in a trial in the courts of this land.

4. That your affiant has never heard of an investigation by a railroad of an officer or a representative of management who was ever made a principal, that is a defendant, or charged at an investigation.

DATED this 25th day of October, 1975.

/s/ C.R. PFENNING

SUBSCRIBED and SWORN to before me this 25th day of October, 1975.

/s/ ROSEMARY H. BREHM
Notary Public for State of Illinois
Residing at:
My Commission expires:
September 13, 1977